



UNITED STATES PATENT AND TRADEMARK OFFICE

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United States Patent and Trademark Office  
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**COPY MAILED**

**NOV 24 2008**

**OFFICE OF PETITIONS**

In re Application of	:	
Gerfast	:	
Application No. 10/733,944	:	DECISION
Filed: 12 December, 2003	:	
Attorney Docket No. (None)	:	

This is a decision on the petition, filed on 27 June, 2008, to revive under 37 C.F.R. §1.137(b) and alleging abandonment due to unintentional delay.

The petition under 37 C.F.R. §1.137(b) is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR §1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR §1.137(b)."

This is **not** a final agency action within the meaning of 5 U.S.C. §704.

As to the Allegations  
of Unintentional Delay

The requirements of a grantable petition pursuant to 37 C.F.R. §1.137(b) are the petition and fee therefor, a reply, a proper statement of unintentional delay under the regulation, and, where applicable, a terminal disclaimer and fee. (However, it does not appear that a terminal disclaimer and fee are due here.)

**It appears that Petitioner has not satisfied the requirements of the regulation, to wit: The instant petition lacks the proper and sufficient fee.**

Petitioner's attentions are drawn to the fee schedule set forth at the Office website:  
[www.uspto.gov](http://www.uspto.gov) .

(It appears that as of this writing the petition fee specified is \$810.00. Petitioner always should review the fee schedule set forth at the Office website (as of this writing at: <http://www.uspto.gov/web/offices/ac/qs/ope/fee2008october02.htm#petition> ) to ensure proper payment.)

If Petitioner wishes to observe the status of the instant application, Petitioner may obtain a Customer Number (see: <http://www.uspto.gov/ebs/portal/register.htm> ) and associate that Customer Number with the instant application .

### BACKGROUND

The record reflects that:

Applicant, failed to reply timely and properly to the non-final Office action mailed on 20 May, 2005, with reply due absent an extension of time on or before 20 August, 2007.

Thereafter:

Petitioner's 6 June, 2005, amendment was followed by the 28 March, 2006, Notice of Non-Compliant Amendment. (All documents discussed herein previously were provided.)

Petitioner's 2 April, 2006, amendment was followed by the 16 June, 2006, Notice of Non-Compliant Amendment.

Petitioner's 23 June, 2006, amendment was followed by the 12 June, 2007, Communication.

Petitioner's 27 June, 2007, amendment was followed by the 27 June, 2007, Notification of Fee Due.

Petitioner is cautioned to consult the Office website ([www.uspto.gov](http://www.uspto.gov)) to ascertain the amount of fees due under the current Fee Schedule and ensure that passage of time between Notice and reply does not trigger a requirement for additional extensions if available.

The Office mailed the Notice of Abandonment on 25 February, 2008;

On 3 March, 2008, Petitioner filed a petition under to 37 C.F.R. §1.181 with, *inter alia*, an averment that replies had been timely and properly filed to non-final Office action, and reasserting an earlier complaint that the "delay was at the PTO"—and ignoring that the extension of time requirement was to make timely Petitioner's reply under the then-current Fee Schedule.

The petition was dismissed on 24 March, 2008, inter alia, for failing to make the required showing.

On 7 April, 2008, Petitioner filed a second petition—thus under 37 C.F.R. §1.137(b) averring unintentional delay, and the petition was dismissed on 19 June, 2008, for failure to pay the proper fee because Petitioner erroneously paid the fee for a petition averring unavoidable delay (\$255.00).

On 27 June, 2008, Petitioner filed the instant petition and set forth on the face of the petition that a fee of \$700.00 was being paid, however, at this writing Office records do not reveal receipt of any payment by Petitioner with the instant petition, and as of this writing the total fee due for the instant petition is \$810.00.

(Petitioner again is cautioned to consult the Office website (www.uspto.gov) to ascertain the amount of fees due under the current Fee Schedule and ensure that passage of time between Notice and reply does not trigger a requirement for additional extensions if available)—thus, Petitioner's showing does not conform to the showing requirements set forth in the guidance of the Commentary at MPEP §711.03( c)(I)(A) and (B) (as to non-receipt or timely filing, respectively (see: the discussion at: [http://www.uspto.gov/web/offices/pac/mpep/documents/0700\\_711\\_03\\_c.htm#sect711.03c](http://www.uspto.gov/web/offices/pac/mpep/documents/0700_711_03_c.htm#sect711.03c) ).

The availability of applications and application papers online to applicants/practitioners who diligently associate their Customer Number with the respective application(s) now provides an applicant/practitioner on-demand information as to events/transactions in an application. Thus, now if one wishes to know the progress in and/or status of an application or the accuracy of the data therein, one need only look at the file online.

Out of an abundance of caution, Petitioners always are reminded that those registered to practice *and* all others who make representations before the Office must inquire into the underlying facts of representations made to the Office and support averments with the appropriate documentation—since all owe to the Office the continuing duty to disclose.<sup>1</sup>

### STATUTES, REGULATIONS

Congress has authorized the Commissioner to "revive an application if the delay is shown to the satisfaction of the Commissioner to have been "unavoidable." 35 U.S.C. §133 (1994).

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<sup>1</sup> See supplement of 17 June, 1999. The Patent and Trademark Office is relying on petitioner's duty of candor and good faith and accepting a statement made by Petitioner. See Changes to Patent Practice and Procedure, 62 Fed. Reg. at 53160 and 53178, 1203 Off. Gaz. Pat. Office at 88 and 103 (responses to comments 64 and 109)(applicant obligated under 37 C.F.R. §10.18 to inquire into the underlying facts and circumstances when providing statements to the Patent and Trademark Office). See specifically, the regulations at 37 C.F.R. §10.18.

The regulations at 37 C.F.R. §1.137(a) and (b) set forth the requirements for a Petitioner to revive a previously unavoidably or unintentionally, respectively, abandoned application.<sup>2,3</sup>

### CONCLUSION

The instant petition under 37 C.F.R. §1.137(b) is **dismissed**.

Further correspondence with respect to this matter should be addressed as follows:

By Mail:                   Mail Stop PETITION  
                              Commissioner for Patents  
                              P. O. Box 1450  
                              Alexandria, VA 22313-1450

By hand:                 U. S. Patent and Trademark Office  
                              Customer Service Window, Mail Stop Petitions  
                              Randolph Building  
                              401 Dulany Street  
                              Alexandria, VA 22314

The centralized facsimile number is **(571) 273-8300**.

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<sup>2</sup> See: Changes to Patent Practice and Procedure; Final Rule Notice, 62 Fed. Reg. at 53158-59 (October 10, 1997), 1203 Off. Gaz. Pat. Office at 86-87 (October 21, 1997).

<sup>3</sup> The language of 35 U.S.C. §133 and 37 C.F.R. §1.137(a) is clear, unambiguous, and without qualification: the delay in tendering the reply to the outstanding Office action, as well as filing the first petition seeking revival, must have been unavoidable for the reply now to be accepted on petition. (Therefore, by example, an unavoidable delay in the payment of the Filing Fee might occur if a reply is shipped by the US Postal Service, but due to catastrophic accident, the delivery is not made.) Delays in responding properly raise the question whether delays are unavoidable. Where there is a question whether the delay was unavoidable, Petitioners must meet the burden of establishing that the delay was unavoidable within the meaning of 35 U.S.C. §133 and 37 C.F.R. §1.137(a) And the Petitioner must be diligent in attending to the matter. Failure to do so does not constitute the care required under Pratt, and so cannot satisfy the test for diligence and due care. (By contrast, unintentional delays are those that do not satisfy the very strict statutory and regulatory requirements of unavoidable delay, and also, by definition, are not intentional.)

Telephone inquiries regarding this decision may be directed to the undersigned at (571) 272-3214—it is noted, however, that all practice before the Office is in writing (see: 37 C.F.R. §1.2<sup>4</sup>) and the proper authority for action on any matter in this regard are the statutes (35 U.S.C.), regulations (37 C.F.R.) and the commentary on policy (MPEP). Therefore, no telephone discussion may be controlling or considered authority for Petitioner's action(s).



/John J. Gillon, Jr./  
John J. Gillon, Jr.  
Senior Attorney  
Office of Petitions

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<sup>4</sup> The regulations at 37 C.F.R. §1.2 provide:

**§1.2 Business to be transacted in writing.**

All business with the Patent and Trademark Office should be transacted in writing. The personal attendance of applicants or their attorneys or agents at the Patent and Trademark Office is unnecessary. The action of the Patent and Trademark Office will be based exclusively on the written record in the Office. No attention will be paid to any alleged oral promise, stipulation, or understanding in relation to which there is disagreement or doubt.